IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 51 OF 1997.

Mr. Norberto V.A.C. De Andrade
(deceased) represented by his
legal heirs:-

a) Mrs. Maria Olivia Miranda.

b) Mrs. Gisela Andrade e Marchon,
both r/o Near Ferry Point,
Betim, Bardez, Goa. .... Appellants.

Versus

Mrs. Prema Nalband
major, married, housewife,
r/o H. No. B-10, Betim,
Bardez, Goa. .... Respondent.

Shri M.S. Usgaoncar, Senior Advocate with Shri Sudesh Usgaoncar, Advocate for the Appellants.

Mrs. A.A. Agni, Advocate for the Respondent.

CORAM: N. A. BRITTO, J.

DATE: 16th SEPTEMBER, 2005.

ORAL JUDGMENT:

This is the plaintiff/landlord's Second Appeal arising from R.C.S. No. 76/91/D and was admitted on a substantial question of law which was modified to read as follows :-

> " Whether the Decree No.43525 is applicable when the lease was created of an open plot on 11.1.1978 and, therefore, no notice was required to be given by the plaintiffs to the defendant before filing the suit for eviction. "

2. The learned counsels appearing for the parties have now submitted that the answer to the said substantial question of law has got to be in the affirmative, but before the said submission is accepted by this Court there are a few facts which are required to be taken note of.

The Decree No.43525 governing the relationship between the landlords tenants has been in force in this State from 7.3.1961. Subsequently, the Transfer of Property Act, 1882 came to be extended to this State from 1.11.1965.

3. The parties hereto shall be referred to in the names as they appear in the cause title of the said Civil Suit.

4. There is no dispute that the plaintiff is the owner of the land. By virtue of an agreement styled as an Agreement for Lease of Land, the plaintiff let out to the defendant a plot of land admeasuring 96 sq.m. (112 x 8m.) for the construction of a carpentry of wooden material covered with tiles or zinc, of their property situated at Betim having Land Registration No.4245 and Matriz No.101, for a period of three years from 1.2.1978 and on payment of monthly rent of Rs.60/-, to be paid in advance in the first

week of each month at the residence of the landlord. The other relevant and important conditions of the said lease were as follows :-

1) That the tenancy shall begin from the first of every month and the rent of every month hereby reserved shall fall due on the first week of the month;

4) That the tenant shall not at any time carry on or permit to be carried on any trade or business upon or in the land or permit the same to be occupied by any other person whatsoever or sub-let;

6) That the land is only for the purpose of construction of carpentry and cannot be used for any other purpose.

5. Although the lease was to come to an end on 31.1.1981, the same continued with the plaintiff accepting the rent till June, 1990, but thereafter the plaintiff sent a registered notice to the defendant dated 30.6.1990 terminating the leasehold right of the defendant, if any, and requiring the defendant to vacate the land on the expiry of one month on the receipt of the said notice.

6. The plaintiff then filed suit for eviction of the defendant on the ground that the defendant had committed breach of the terms of the said lease, namely, that the defendant:-

(a) had changed the user of the land namely that instead of running a carpentry had started running a motor workshop;

(b) that the same was run not by the defendant but by her son; and

© the defendant was in arrears of the payment of rent from June, 1990.

7. The defendant contested the suit stating that there was no breach of any of the conditions of the lease. The defendant pleaded that although there was certain conditions in the lease deed dated 1.2.1978 which expired on 1.2.1981 the plaintiff himself had allowed the defendant to carry on any other business in the said shed at the request of the defendant after the expiry of the lease deed dated 1.2.1978 and therefore the defendant started the motor workshop soon after the expiry of the said lease deed, along with carpentry in the said shed.

8. Article 46 of the Decree gives a right to a lessor to rescind the agreement. Some of the grounds for rescission are where the lessee:-

(a) does not pay the rent within the time limit and at the proper place or does not make a deposit thereof which the law considers as exonerative (liberatorio);

(b) makes use or permits that a third party may use the leased

building for purposes of land for business different from those for which it is meant;

(f) sub-leases totally or partly, the building in case in which the sub-lease is unlawful, invalid or ineffective in relation the lessor.

9. There is no dispute that at the time of execution of the agreement the Decree was in force, as a special law and the relations between both the parties were governed by the said Decree. In fact, a Division Bench of this Court in the case of ***Gangadhar Narsingdas Agrawal v. Alina D'Costa e Pinto & Ors. (1989 (2) Goa L.T. 118)*** has held that the Decree provides for additional protection, a protection which is identical which is provided to tenants under various Rent Acts in this country and which protection is not available to a contract of lease under the Transfer of Property Act. The learned Division Bench of this Court has also held that the Decree does not stand repealed with the advent of the Transfer of Property Act since what is prescribed under the Decree could not be said to be a law corresponding to the Transfer of Property Act. If the decree is the special law governing the relationship between the landlords and tenants in cases such as this where lease was created in respect of a parcel of land for erection of a temporary structure for a period of three years for running a carpentry then in such cases no notice of termination would be required. In fact, this principle has been

recognized in a number of decisions beginning with the case of ***V. Dhanapal Chettiar v. Yesodai Ammal (A.I.R. 1979 S.C. 1745)*** wherein the Hon'ble Supreme Court stated that in order to get a decree or order for eviction against a tenant under any State Rent Control Act it is not necessary to give notice under Section 106 T.P. Act. Determination of a lease in accordance with the Transfer of Property Act is unnecessary and a mere surplusage because the landlord cannot get eviction of the tenant even after such determination. The tenant continues to be so even thereafter. That being so, making out a case under the Rent Act for eviction of the tenant by itself is sufficient and it is not obligatory to found the proceeding on the basis of the determination of the lease by issue of notice in accordance with Section 106 of the T.P. Act. The Supreme Court again in the case of ***Smt. Gian Devi Anand v. Jeevan Kumar and others (A.I.R. 1985 S.C. 796)*** has stated that the Rent Control legislation in fact, as pointed out by this Court in V. Dhanapal (supra) does not make any distinction between the contractual tenant and statutory tenant. It does not permit the landlord to snap his relationship with the tenant merely by his act of serving a notice to quit on him. Inspite of the notice, the law says that he continues to be a tenant and he does so enjoying all the rights of a lessee and is at the same deemed to be under all the liabilities such as payment of rent etc. in accordance with the law. Needless to observe the plaintiff would be

entitled to a decree for eviction of the tenant only on the grounds available under the Decree and not otherwise and therefore the question of giving a notice of terminating the tenancy would not arise.

10. Although the lease agreement was executed between the plaintiff and the defendant at the time when the Decree was in force and was otherwise governed by the Decree, the plaintiff proceeded on the assumption that the relations between the parties were governed by the Transfer of Property Act. The learned trial Court after giving a finding that the defendant had committed breaches of the said lease agreement, came to the conclusion that after the termination of the lease deed, the defendant was a tenant holding over and since his leasehold right, if any, was terminated by the plaintiff by a legal notice issued to the defendant under S.106 of the Transfer of Property Act and since a legal notice was given by the plaintiff under S.106 of the Transfer of Property Act, the tenancy was terminated and therefore proceeded to decree the suit. The defendant filed an appeal against the said Judgment/decree and even in the appeal filed the learned appellate Court framed two points for determination namely:-

(i) Whether the termination of tenancy by issuing notice was not valid; and

(ii) Whether the appellant was protected by the Decree No.43525 ?

and answered the first point in the negative on the ground that the tenancy was for manufacturing purpose and therefore the notice had to be of six months in terms of Section 106 of T.P. Act and this inspite of the fact that it was clearly stipulated between the parties that the tenancy would begin from the first of every month and the rent would be payable in advance in the first week of each month.

11. Regarding the second question the learned first appellate Court came to the conclusion that since the lease was on an open land, it was covered by the said Decree and the defendant was protected under the said Decree but failed to consider whether any notice was at all required to be given, once it as held that the relations between the plaintiff and the defendant were governed by the lease agreement executed between them under the provisions f the said Decree No.43525.

12. Although the plaintiff had consistently avoided to submit before both the courts below that the suit was governed by the provisions of the Decree No.43525, the defendant had made an alternate submission before the first appellate court that since the lease was of an open piece of land, the Decree No.43525 was applicable and not only that , had also placed reliance on the said case of Gangadhar Agrawal (supra) on which now the plaintiff has

placed reliance.

13. Now both the parties are ad idem that since the lease was of an open piece of land, the relations between the parties are governed by the said Decree No.43525. I have already stated that the decree being a special law in force in this State governing leases of open pieces of land let out to tenants, no notice would be required to be given for terminating of such tenancies and a suit could be based on the grounds of eviction available under Art.46 of the said Decree.

14. Shri Usgaonkar, the learned Senior Counsel has submitted that the plaintiff would press for the eviction of the defendant/s only on the ground of change of user available to the plaintiff under Art. 46(6) of the Decree. However, the learned Advocate Mrs. Agni submits that there is no finding recorded by the courts below and particularly by the first appellate court that the defendant had committed a breach of any of the conditions of the said agreement enabling them to file a suit for eviction. Learned Advocate Mrs. Agni further submits that if at all any finding was given, the same was in relation to the Transfer of Property Act and not in relation to Decree No.43525 and therefore the matter requires to be remanded to the first appellate court to give a finding whether the defendant had at all committed a breach of the said agreement by setting up a garage or a

motor workshop when it was a specific case pleaded by the defendant that the said motor workshop was started by the defendant with the permission of the plaintiff after expiry of the lease deed dated 1.2.1978. On the other hand, learned Senior Counsel Shri Usgaoncar has submitted that there is a specific finding given by the learned trial Court which has been endorsed by the first appellate Court in para 13 of its judgment.

15. Smt. Agni, the learned counsel submits that the defendant had argued before the first appellate Court that the finding given by the trial Court that there was a breach of condition No.4 was based on no evidence and particularly that it was given without considering the evidence of D.W.2 Laximan Naik examined by the defendant in support of her case.

16. In reply Shri Usgaoncar has submitted that the first appellate court need not give detailed reasons if it is to approve the finding of the trial Court, but detailed reasons would be necessary in cases where the findings are reversed and on this aspect learned Senior Counsel Shri Usgaoncar has placed reliance on the case of ***Santosh Hazari v. Purushottam Tiwari (deceased) by LRS. [(2001) 3 S.C.C. 179]*** wherein the Supreme Court has stated thus :-

> " The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons,

> on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. The task of an appellate court affirming the findings of the trial court is an easier one. The appellate court agreeing with the view of the trial court need not restate the effect of the evidence or reiterate the reasons given by the trial court; expression of general agreement with reasons given by the court, decision of which is under appeal, would ordinarily suffice. ”

17. I am not at all inclined to accept the submissions of learned Advocate Smt.Agni that the case should be remanded to the first appellate Court to assess the evidence and give a finding whether there has been a breach of condition No.6 i.e. that the defendant had started a motor workshop without the permission of the plaintiff. There was no dispute at all that the defendant was running a garage or a motor workshop in the leased plot of land let out to the defendant. The lease deed, in terms of clause (6) thereof had prohibited the defendant from carrying out any other trade or business or the same to be occupied by any other person. The plaintiff had alleged in the notice that presently a motor workshop was functioning in the leased land and the same was run by the son of the defendant. There was no dispute that in fact the motor workshop was being run in the leased plot. However, the case of the defendant was that the plaintiff himself had allowed the defendant to carry on any other business. The learned trial Court had framed Issue No.2 which dealt with

the breaches committed by the defendant and the said issue was answered in the affirmative and in answering the said issue, the learned trial Court came to the conclusion that the plaintiff (P.W.1) was amply corroborated by her witnesses and the defendant herself through her attorney had established that the workshop was run contrary to the terms of the lease deed. The trial Court also found that the defendant was very vague about the point of time when she sought the so called oral permission to convert the carpentry into the workshop and therefore the plaintiff had shown that the defendant had committed breaches of the terms of lease. This finding has been endorsed by the learned first appellate Court in para 13 of the judgment when the learned first appellate Court observed that there appears to be violation of the terms of the lease agreement and that the learned trial Judge had found fault with the appellant (defendant) in converting the shed of carpentry workshop into motor repairs workshop and this breach of contract by the appellant (defendant) went against her and was a ground for her eviction but for the said notice under S.106 of the T.P. Act. In other words, there has been a clear finding by the learned trial Court that there was a violation of clause (6) of the lease agreement by the defendant by setting up a motor workshop when, in fact, the plot was let out to set up a carpentry, a finding which has been endorsed by the learned first appellate Court. That finding is a finding of fact and it would make no difference whether it was given in the light of the provisions of

the T.P. Act or for that matter in the light of the provisions of the Decree. The contention that the said finding had to be given by keeping in mind the provisions of the Decree has got to be rejected.

18.Another grievance made by the learned Advocate Smt. Agni is that the finding regarding the breach of conditions of the lease was taken up before the first appellate Court and the same was not dealt with exhaustively by the said Court. In this context learned Advocate Smt. Agni has referred to ground (x) of the Memorandum of Appeal. In my view, only because a ground was taken in appeal, does not necessarily mean that it was urged before the first appellate Court. The first appellate Court, as already seen, raised two points for determination and that shows that the finding of the trial Court as regards breach of the conditions of the agreement were not in fact urged before the first appellate Court. In case a ground was urged and was not dealt by the first appellate Court, then it was necessary for the defendant to have filed a review before the first appellate Court and get the said judgment of the first appellate Court reviewed which has not been done in this case. In the case of ***Bank of Bihar v. Mahabir Lal and others (A.I.R. 1964 S.C. 377)*** it has been stated that when a particular thing happened or did not happen before a court, it ought not ordinarily to be permitted to be challenged by a party unless of course both the parties

to the litigation agree that the statement is erroneous and the remedy of a party aggrieved is by way of review of the judgment which the defendant admittedly did not avail of. In my view there are concurrent findings of fact of both the courts below that the defendant had set up a garage or a motor workshop without the permission of the plaintiff and contrary to the clause (6) of the agreement and being so, there is absolutely no case for remand made out by the defendant. Therefore the submission of learned Advocate Mrs. Agni has got to be rejected. Even if the said finding is to be independently considered, it can be seen that the plea of the defendant was that the Plaintiff himself had allowed the defendant to carry on any other business. The Defendant herself did not step into the witness box to prove such a plea and on the contrary DW.1 Prabakar stated that it is he who had approached the Plaintiff for seeking permission. This version, apart from being contrary to the plea taken, was not supported by any other evidence, not even of DW.2 Laxman Naik and therefore could not be accepted in the light of condition (6) of the lease deed which had prohibited the change of user. DW.1 had conceded that he had nothing in writing to show that the plaintiff had permitted to convert the carpentry into a garage.

19. In view of the above, the substantial question of law is answered in favour of the plaintiff, in that since the suit was filed for eviction of the

defendant for breach of the conditions of the terms of the lease deed under the grounds available under the Decree No.43525, no notice was required to be served on the defendant terminating the tenancy. Consequently, this Second Appeal is allowed, the Judgment/Order of the first appellate Court dated 25.6.97 is hereby set aside and that of the Trial Court dated 25.11.94 is restored, with costs.

N. A. BRITTO, J.

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